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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Respondent.

No. 49

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Respondents.

MEMORANDUM OF ADDITIONAL AUTHORITIES

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MEMORANDUM OF ADDITIONAL AUTHORITIES.

In their reply brief filed herein, at page [illegible] Messrs. Latzko & Pepper quote a small portion from an opinion of LEHMAN *J.*, in *P. V. Bureaucratic Co., Ltd.* vs. *Guaranty Trust Company*, a case which has never been officially reported but which appeared in the New York Law Journal for November 12, 1921. This case, which

has not been relied on by either party in the lower courts, was undoubtedly obtained by the petitioners from the brief which the Guaranty Trust Company sought to file herein as *amicus curiae* because of the latter's interest as petitioner in the case of *Guaranty Trust Company* vs. *G. F. Grohe-Heurich & Co.*, No. 545, in which an application for a writ of *certiorari* is now pending undecided before this Court. The question raised in the Guaranty Trust Company's case is closely related to that raised in the present case.

It is believed that the whole opinion of LEHMAN, J., should be before this Court for it clearly sustains the Trustee's argument that the words "for account of," when used in connection with the deposit of funds, do not always indicate an agency relationship. Judge LEHMAN's opinion reads as follows:

> "The complaint alleges that the defendant deposited with the Empire Trust Company in February, 1916, the sum of $1,740,000 for account of the plaintiff 'as per contract made on their behalf.' This deposit was made 'by order' of the Russo-Asiatic Bank. On the 6th day of January, 1917, the Empire Trust Company paid to the defendant the sum of $1,140,000 for the account of the plaintiff, and the defendant credited this amount on its books to the plaintiff. On January 13, 1917, the defendant received a cable from the Russo-Asiatic Bank as follows: 'Credit amount received Empire Trust Company account Baranowsky works our account,' and on January 24 the defendant notified the Russo-Asiatic Bank: 'In accordance with your cable of January 13 we have credited your special account with $1,140,000 value

January 6 received from Empire Trust Company account Baranowsky.' On the same day the defendant notified the plaintiff that it had received a cable from the Russo-Asiatic Bank 'requesting us to credit their account with the $1,140,000 value January 6. We have accordingly debited your account with the foregoing amount value January 6.' Thereafter, on March 13, 1917, the Empire Trust Company paid to the defendant the sum of $602,169.86, 'being the balance of the money received by the Empire Trust Company from the Guaranty Trust Company of New York for account of the plaintiff on February 13, 1916.' On the same day the plaintiff delivered to the Empire Trust Company a letter from the Russo-Asiatic Bank disclaiming any interest in the moneys received by the Empire Trust Company in February, 1916, and stating 'that these moneys belong to P. V. Baranowsky & Company,' and the plaintiff also delivered to the defendant a letter directing it to place the sum of $602,169.86 which it would receive from the Empire Trust Company to the credit of P. V. Baranowsky & Co. On the following day the plaintiff delivered to the defendant another letter, in which it directed the defendant to make payments from this account in the sum of $35,000 and to place the balance, amounting to $567,169.86, 'to the credit of Russo-Asiatic Bank, Petrograd, for account of P. V. Baranowsky Company, Ltd.' The defendant has complied with these directions, but has not repaid to the plaintiff or to the Russo-Asiatic Bank for the account of this plaintiff the sums of $1,140,000 and $567,169.86, which it holds on deposit 'to the credit of the Russo-Asiatic Bank for account of the plaintiff.' The defendant has demurred to the com-

plaint on the ground that it fails to state facts sufficient to constitute a cause of action, and now urges that the complaint shows merely a deposit to the credit of the Russo-Asiatic Bank, creating a debt to that corporation which the plaintiff has no right to demand from the defendant. The plaintiff does not contend that if the Russo-Asiatic Bank had in fact collected the amount deposited to its credit for the plaintiff's account the defendant would have been obliged to pay this amount to the plaintiff also, but it does contend that when the defendant received the moneys from the Empire Trust Company for the account of the plaintiff it became indebted to the plaintiff for the moneys so received and that the subsequent placing of this amount to the credit of the Russo-Asiatic Bank 'for account of the plaintiff,' though made by the defendant with the plaintiff's consent or even by its direction, did not constitute a payment of this indebtedness or a novation, but that in effect this was merely a bookkeeping entry made to facilitate the collection of the debt due to the plaintiff, through the Russo-Asiatic Bank as agent, and that the plaintiff could at any time revoke this agency and demand from the defendant the payment of the debt. For the purpose of this motion I will assume without further analysis of the allegations of the complaint that when the defendant received these moneys from the Empire Trust Company for the plaintiff's account it became indebted to the plaintiff in this amount and bound to pay it to the plaintiff on demand. Thereafter the rights of the parties were the same as if the deposit in plaintiff's favor had been made by the plaintiff itself. Ordinarily I think it cannot be questioned that the direction of a depositor to

transfer the account of another when acquiesced in by both the bank and the new creditor constitutes a novation whereby the bank accepts a new creditor in place of the original depositor in consideration of the cancellation of its indebtedness to the latter. As between the bank and the original creditor there is a good consideration for the contract of novation, and if as between the old depositor and the new depositor there is any ground for setting aside the assignment of the original indebtedness of the bank, this can be done only in an action between these parties. In the present case, however, the plaintiff claims that it never consented to a substitution of creditors or directed that the deposit should be transferred to the Russo-Asiatic Bank, but only that the deposit be transferred to the credit of the Russo-Asiatic Bank for plaintiff's account; that the moneys deposited never belonged to the Russo-Asiatic Bank, and that that bank acknowledged in the letter delivered to the Equitable Trust Company on March 13, 1917, that it had no claim to such moneys and that they belonged to the plaintiff, and finally that in authorizing the defendant to place the moneys to the credit of the Russo-Asiatic Bank for the plaintiff's account it gave notice to the defendant that the moneys were still the property of the plaintiff and that the Russo-Asiatic Bank was merely its agent for collection. The statements contained in the letter of the Russo-Asiatic Bank to the Empire Trust Company might create an estoppel if acted upon by the Empire Trust Company, but in any action between other parties they would constitute merely an admission which might perhaps be introduced in evidence, but which would not conclusively establish

the truth of the statement. The validity of the plaintiff's contention must therefore depend upon the effect to be given to the form in which it authorized that the moneys on deposit be placed to the credit of the Russo-Asiatic Bank. It has been frequently held that an indorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for collection. From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive indorsement. *A deposit in a bank to the credit of one party for the account of another or an authorization to transfer a deposit account to the credit of another for the account of the original depositor can and frequently does, however, have other purposes than mere collection, and this is particularly true when the account is in favor of a bank doing business in another city.* It can and undoubtedly frequently does happen that a deposit is made in a New York bank to the credit of an out-of-town bank for the account of the depositor upon an arrangement made with the out-of-town bank that as soon as the deposit is made the depositor may draw upon the out-of-town bank, or upon an arrangement made with the out-of-town bank that the deposit when made shall cancel a pre-existing debt. There is no allegation in this case that no such agreement was made with the Russo-Asiatic Bank, or that no advances were made by such bank to the plaintiff on the faith of this deposit to the credit of the Russo-Asiatic Bank; there is no allegation that the words 'for

the account of' have any well-established meaning in the banking community; there is not even an allegation that the moneys originally on deposit belonged to the plaintiff and not the Russo-Asiatic Bank. At most there are allegations of evidentiary facts from which an inference might be drawn that the plaintiff was the owner of these moneys and that the change in the form of deposit gave notice to the defendant that the plaintiff always continued to own the moneys. The court should not now pass upon what allegations might be sufficient to constitute a cause of action against the defendant, but it seems clear that in the absence of allegations that the moneys on deposit belonged to the plaintiff; that the change in the form of deposit was made merely for collection; that the defendant had notice of these facts and that no advances have been made by the Russo-Asiatic Bank upon the faith of the deposit to its credit for plaintiff's account, no action will lie by this plaintiff against the defendant after it is shown that plaintiff authorized the defendant to place the moneys to the credit of the Russo-Asiatic Bank for plaintiff's account. The complaint contains no allegations of such facts, but at best allegations from which inferences that such facts exist might be drawn, and a complaint which contains only allegations from which an inference of fact might be drawn is insufficient (*De Cordova vs. Sawvide*, 165 A. D., 128, reversed on opinion of Ingraham, J., 214 N. Y., 662). Plaintiff's motion for judgment is therefore denied, with $10 costs, and with leave to serve an amended complaint within twenty days after notice of entry of order herein, upon payment of said costs. Settle order on notice." (Italics are ours).

For the convenience of the Court reference is also made here to the case of *Marvin* vs. *Martin* (C. C. A., 6th 1927) 20 Fed. (2d) 746, which will be cited on the argument. The case was not referred to in earlier briefs because of the fact that it was reported for the first time in the Federal Reporter Advance Sheet of September 29, 1927.

Respectfully submitted,

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